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No. 97-1808

IN THE

SUPREME COURT of the UNTED STATES

October Term, 1998

MICHAEL BELLESFIELD,
Petitioner

v.

ATTORNEY GENERAL OF THE STATE
OF NEW JERSEY, et.al.

On Petition For Writ Of Certiorari
To The U.S. 3rd Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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37 pp

SUPREME COURT OF THE UNITED STATES OF AMERICA

QUESTIONS PRESENTED

1. Is abstention appropriate when there exists a confluence of competing doctrines of federalism and family rights, and risks of the erroneous deprivation of "fundamental rights of a Constitutional dimension" in a discrete "suspect category" in contravention of The Child Abuse Prevention and Treatment Act of 1973, 42 USC Section 5101 et seq.?

2. If the District Court, by its abstention in such a case, causes to be left undisturbed a state court decision, which is contrary to the evidence presented and the weight of Federal case law, and many cases and precedents of this Court and long standing Federal and Public policy, thereby creating conflicting precedents, should the Circuit Court reverse such abstention?

3. Should the doctrine of federalism compel the federal courts to defer to state interests, when such interests involve violations of Constitutional safeguards of an equally important private interest and in light of malfeasance and criminal activities by state officials committed under color of state law, amounting to state sponsored kidnapping in order to receive federal funding in violation of 42 USC Section 671 (a) (5)?

LIST OF PARTIES

MICHAEL BELLESFIELD; ERIC BELLESFIELD,
a minor,
plaintiffs,

v.

ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, PETER VERNIERO, in official capacity only;

PETER ALVINO, individually and in official capacity;

NEW JERSEY DEPT. OF HUMAN SERVICES, WILLIAM WALDMAN, DIRECTOR, in official capacity only;

DIVISION OF YOUTH AND FAMILY SERVICES, JAMES VALENTINE, DAVID JOHNSTON, individually and in official capacities;

FAMILY ENRICHMENT PROGRAM; MORRISTOWN FORENSIC ASSOCIATES, MICHAEL SHEA, MICHAEL FIORE, individually and in official capacities;

MORRIS COUNTY PUBLIC DEFENDER'S OFFICE, JOEL HARRIS, individually and in official capacity;

RANDOLPH TWP. SCHOOL SYSTEM, CARMINE GAITO, NORMA MIELE, SUSAN HERSCHMAN, ERIC HERSCHMAN, individually and in official capacities;

MORRIS HILLS SCHOOL SYSTEM, BRADLEY, MR., STORM, MR., individually and in official capacities;

CHILD PLACEMENT REVIEW BOARD, SUZANNE WARREN, individually and in official capacity.

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SUPREME COURT OF THE UNITED STATES OF AMERICA

JURISDICTION

This petition arises out of the final Order of the United States Court of Appeals for the Third Circuit entered on February 6, 1998, affirming the dismissal of the case by the District Court, based upon Younger abstention. Original jurisdiction was pursuant to 42 USC Sec. 1983 and 123131 et seq. Appellate jurisdiction was pursuant to FRAP 11, 12(c)and FRCP 54(b). Jurisdiction in this Honorable Court is pursuant to Supreme Court Rule 10 (a) (c), 28 USC 2101(c). The petition was timely filed on May 6, 1998.

CONSTITUTIONAL PROVISIONS, STATUTES AND ACTS

The statutory provisions involved include relevant portions of the Civil Rights Act of 1866 and 1871, 42 USC Sec.1981 and 1983 respectively. The Child Abuse Prevention and Treatment Act of 1973, 42 USC 5101 et seq. and related provisions of the Social Security Act, 42 USC 670 et seq., specifically 42 USC Sec. 671(a)(8)-(15). The Americans with Disabilities Act Titles I, II, III, 42 USC Sec 12101 et seq. specifically 42 USC Sec.12112 (B)(6). 18 USC Sec. 242, and N.J.S.A. 9:6-8.21c. Relevant portions of same are reproduced in the Appendix, A-pp.48-62 .

PROCEDURAL HISTORY

This case dates back to early 1987, when the Division of Youth and Family Services (hereinafter DYFS), made the first intervention with the Bellesfield family, consisting of Mr. Michael Bellesfield and his son Eric, then age seven. Between 1987 and 1994 DYFS conducted no fewer than six investigations of same, yet their OWN FILES show that NOT ONE incident was substantiated as abuse A-p 67. Ostensibly, statements made by Eric sparked most of these events.

In January 1994, appellant revoked that agreement. As a result DYFS filed a petition for protective custody. Although review

hearings were held in 1994 and 1995, resulting in Orders extending DYFS custody and Eric was placed in foster care, no full plenary hearing held until July 18, 1995. The child was held for almost two years without any due process. After a two day hearing in New Jersey Superior Court, the Judge found Eric to be an abused child under NJSA 9:6-8, despite the fact that there was not one documented incident of abuse substantiated, according to their own files.

Appellant filed suit in Federal District Court for relief on behalf of himself and his son on 3/11/97. It was originally brought as a "hybrid" complaint under both 42 USC 1983 and as a writ of habeas corpus. The Court would not accept the Complaint in that form and issued an Order to Show Cause, on 3/18/97, which required that the appellant file an amended Complaint and/or show why the matter should not be dismissed. An amended Complaint was filed under 42 USC 1983 and 12131 et seq. on March 25, 1997 and was accepted by the Court, along with a motion for injunctive and declaratory relief, seeking the release of Eric and redress of damages for violations of Constitutional rights. The motion for injunctive relief was denied and on 4/23/97. The District Court issued its Final Order on 6/26/97 and abstained under the Younger doctrine and dismissed the case without prejudice. The Order was timely appealed and the Third Circuit affirmed on February 6, 1998.

This petition is taken from that Order.

STATEMENT OF THE CASE

Since 1987, DYFS, and the other defendants named herein, has engaged in a conspiracy that has consisted of a pattern of escalating intrusion into the life of this family. These actions were taken under color of State Law, through abuse of their discretionary power and process and violating applicable State Law, or alternatively, a State Law that is challenged here as unconstitutional.

This is a law that permits DYFS to take a child from their home on a discretionary basis. There need be no fact or evidence of abuse, but is based on predictions by DYFS workers and experts.

It is submitted that this conduct on the part of DYFS has been a systemic pattern for at least a decade, as referenced in the 1988 New Jersey Senate Hearing transcript, Lodging-A, pp 24-25, 87-88, 118-119, 140-141, 149; 155, and the N.J. Legal Services report, "Families at Risk", Lodging-B, in it's entirety. In so doing, DYFS is also violating their own mission, to keep families intact where possible.

Using heavy handed "Gestapo" like tactics, DYFS has followed the same scenario of insidious, progressive bureaucratic escalation for years. This custom and practice is a process through which DYFS, with the aid of their contracted agencies, begins intervention by means of a "Voluntary Placement Agreement," or other minimal intrusion, and then engages in a step by step escalation, using their experts to validate their requests for same.

This escalates to more intrusive interventions, toward taking the child from the home and often the termination of parental rights, especially when there are single parents and more especially single fathers, who will not automatically succumb to their authority. Such actions are taken under the guise of compelling state interests, but are unwarranted intrusions for the sake of receiving federal funding, taken in reckless disregard for the welfare of the very people they are supposed to be protecting.

This agency is fraught with systemic corruption, drunk with power and out of control. In the instant case, they took the child, despite the fact that there was NEVER ONCE any substantiation of abuse. DYFS' own records confirm this as seen on A-p.67 that was prepared by defendant Johnston. In fact, in each of the DYFS interventions, the workers stated there was not any abuse. Yet during this same time period the child was subjected to a strip search at his school and to physical abuse by the foster mother. See A-pp.69-74 which includes DYFS reports from 1992 to 1994.

In the four years that child had been in State's custody DYFS had neve contacted the child's pediatrician with regard to investigating any incidents of abuse.

The appellant now has no say whatever in any decisions regarding the care and custody of his natural son whom he raised as a single parent since infancy. He does not know where his son is, whether he is going to school or how he is doing academically.

Appellant has no idea whether the child is attending the church of his choice, violating a "hybrid" right as noted in Wisconsin v. Yoder, 406 US 205 (1972), and a clearly defined area in which the State has no right to interfere, yet do so through their abuse of power, A-p76, and A-pp6-74.

This is also true with respect to the misuse of the "Voluntary " Placement Agreement as referenced in Lodging-B in footnote 1 on page 4 of the report. It states that 75%-80% of the children now in foster care are there pursuant to such "Voluntary" agreements. It is submitted that the facts and documentary evidence, in the record below, is sufficient to establish a prima facie case, of bad faith, malfeasance of the highest order, including the forging of signatures on legal documents and falsifying reports. A-p77-78.

Even in the January 8, 1994 incident which triggered the current proceedings, the worker, Mr. Valentine, wrote in his Report, "There is no injury...no imminent danger to Eric and no need for intervention," A-p80. Then, because Eric said he did not want to go home, Mr. Valentine invoked the "Voluntary Placement Agreement" by intimidation and by lying about it's true nature. Appellant was given a routine ultimatum by the worker, which causes the abuse of that agreement; that he could either sign the "Voluntary" agreement and maintain custodial control over his son, or DYFS would get a Court Order to take him anyway. They were aided in this cause, since Eric, as a normal rebellious teenager, had learned he could manipulate his father through statements to DYFS, as indicated in DYFS finding of September 29, 1993, A-p70, also stated on A-pp69-74. Clearly, however, when the long standing DYFS record has NEVER ONCE substantiated abuse, there is NO GOOD FAITH basis for any further State intrusion. Yet the defendants continued the escalation to change the initial goal of from "voluntarily placement" to "temporary placement" to "short term placement" to "long term placement" as seen on A-p77. For almost two years, without so much as a hearing or ANY due process, appellant was totally cut off from his son.

He had no input as to Eric's custody and was not permitted access to his child, except in a DYFS supervised setting. Yet even this was problematic, since DYFS puts these visits under a microscope and they are used in Court, as a pretext for taking even

more intrusive measures. If the parent objects to the visitation site, or requests a different site or monitor, then once again they "not cooperating." Such a scenario only buttresses the conspiracy alleged, which is perpetuated upon the unsuspecting parent who is confronted by therapists who demand that the parent admit to the alleged abuse and submit to their authority. If the parent does not, then they are said to be exhibiting denial, which again enables DYFS to state that the parent is not cooperating. This is quite a Catch 22 for the parent who is innocent of the charges.

The true motives and clear indication of the State's intentions were illustrated in their attempt to locate Mr. Bellesfield's sister. Their real goal was clearly stated in the letter written by Sharon Arnold an investigator working for defendant Warren, as seen on A-p82 in which she said:

> "In order for the child in question to be made available for adoption all efforts to locate existing relatives must be exhausted."

It is submitted that this is nothing less than a smoking gun with respect to the real DYFS agenda. Nothing more is needed to sustain the prima facie case that this was, in fact, their ultimate goal from the outset. All of this was done PRIOR to any finding of abuse by any agency or Court and without due process of law. The deprivations here, which occurred under color of state law are an egregious violation of due process rights, Federal and public policy.

During the two days of hearings in New Jersey Superior Court, testimony was taken from a variety of DYFS workers and their experts. The Court then found that Eric was abused under NJSA 9:6-8.21 (c), which is challenged constitutionally herein as being vague and ambiguous, stating in pertinent part:

> "A child who's physical, mental or emotional state has been impaired or is in imminent danger of becoming impaired..."

This statute in its current form allows the State to take a child, based on the use of predictions by their own "experts," who have no more ability to predict the future than anyone else. The finding was not based on any real incidents of abuse, since there were none, but by the "risk assessment," done by Drs. Shea and Fiore as well as the

DYFS workers. These "predictions" are at best, educated guesses, and are not within acceptable standards of their professions and surely no basis for taking a child from a parent with no evidence of abuse. Given the opportunity the appellant will present well known forensic experts who will attest to same.

Yet this testimony resulted in an Order that Eric remain in DYFS custody indefinitely. DYFS will not disclose the child's whereabouts to his father and will not permit the father access to his child, all in contravention of the very Act from which they derive their funding and authority. As the record shows, the State Court used the wrong threshold of proof needed to prevent access of a parent to their child, i.e."a preponderance," as opposed to "clear and convincing" Santosky v. Kramer, 455 US 745(1982), and wrongfully shifted the burden of proof to the parent in violation of his due process rights. When the appellant turned to the Federal Court for relief, the District Court abstained without holding a hearing and/or interviewing the child.

REASONS FOR GRANTING PETITION

POINT ONE:
FEDERALISM, FAMILY RIGHTS, AND THE CONSTITUTION

This case concerns the controversy which arises out of the confluence of competing doctrines of federalism, comity fourteenth amendment protections, Younger abstention and family rights, pursuant to 42 USC 5101 et seq. It implicates a long line of Federal case law related to perhaps one of the most important issues confronting the Nation, to wit: the sanctity of the American Family. It is submitted that the gravity of the interests at stake are of such importance that it demands the attention of this Honorable Court.

Moreover, the case also includes the nexus between the Federal Child Abuse Prevention and Treatment Act of 1973, (hereinafter "the Act") and its state corollaries, which raise even more complex issues, including whether the Act itself may actually be creating institutionalized abuse between the state agencies, in their

competition to obtain the federal funds, the very problem the Act seeks to remediate.

It is also submitted that the record established below is more than sufficient to reach a prima facie case of bad faith, harassment, malfeasance and other exceptional circumstances to overcome the propriety of invocation of abstention by the Federal Courts even if it were applicable. Further, the State Court judgement left undisturbed by the lack of intervention, is in conflict with both state and federal law, and a long line of cases, thus creating conflicting precedents.

Moreover, it is submitted that the issues raised herein are of such extraordinary public importance, this Honorable Court has deemed them;

> "Fundamental Rights of the highest order, finding their source not in state law, but in intrusive human rights as they have been understood in our Nation's history and tradition." Smith v. Org. of Foster Parents, 431 US 816 (1977).

Thus the private interest is at least as compelling as the public interest of the state: since, in truth, they are really the same, to wit: the preservation and protection of the family. Ideally, if state agencies abided by the Federal perspectives which emerge both from the legislative acts and the case law, which set an exceedingly high threshold to remove a child from its natural parents, it would mean that there would be little conflict between the state agencies and the families they serve. While there is no argument that in certain situations the state interest in protecting a child may conflict with a parent's rights, if the states followed the federal mandate, such cases should be the exception and not the rule.

Federal judicial and public policy is very clear regarding the sanctity of family rights. It is unrefuted that Federal laws set clear limits and place the highest value on parent/child relationships. They cannot easily be breached. Such cases are predicated upon clear and convincing evidence of parental unfitness, gross abuse or battering are clear and are accorded the highest level of due process. Yet the majority of state statutes regarding same are exceedingly vague and ambiguous and grant state workers broad discretion

with respect to same. Short of such evidence, intervention should be limited to other remedies and states laws must be made to conform. If that were so, cases like this, alleging that a child has been illegally taken would not arise, unless the agency had violated its mandate.

This would also effectively obviate any private versus state interest conflict. The real issue would then be federal versus state interests as it should be, when fundamental rights are alleged to have been abridged. As far back as 1937 federal law has been clear, in that parental rights;

> "Are implicit in the concept of ordered liberty [such that...neither liberty nor justice would exist if they were sacrificed." Palko v. Connecticut, 302 US 319 in (1937).

In Moore v. City of Cleveland, 431 US 494 (1977), the Court stated that these rights, "Are deeply rooted in the Nation's history and tradition." The rights to conceive and raise one's children have been deemed "essential," Meyer v. Nebraska, 262 US 390, 399 (1923), "basic civil rights of man" Skinner v. Oklahoma, 316 US 535, 541 (1942), and "rights far more precious...than property rights." May v. Anderson 345 US 528, 533 (1953). In Stanley v. Illinois, 405 US 645 (1972) the Court stated;

> " The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful counter-veiling interest, protection."

Abstention should not even be an option in cases such as this, when as noted in Santosky, supra, the Court stated;

> "Given the weight of the private interests at stake, the social cost of even an occasional error could be sizable...the State registers no gain toward its declared goals when it separates children from their natural parents in error."

Parents should not be deprived of their right of access to the Federal Courts, when a state may have illegally taken a child from their home. The overarching issue in this case is nothing less than one of

the most important in the history of American Jurisprudence; the preservation of the fundamental unit of society.

What is really at issue here is the balancing of the doctrines of comity, federalism and abstention, with the importance and sanctity of the family. In a long line of cases from In re Gault, 387 US 315 (1966) through Santosky v. Kramer, supra, to one of the most recent cases, Brooks v. Mississippi, (cite omitted) in which Justice Ginsberg wrote;

> "We place decrees forever terminating parental rights in the category of cases in which the State may not bolt the door to equal justice...Parental termination decrees are among the most severe forms of State action."

The issues raised here are one of the discrete areas in which the Courts have been most reticent to judge that the private interests be automatically subordinated to the doctrines of federalism and comity, which inevitably put the State interests first, and which trigger abstention by the Federal Court for the very reasons which are cited as problematic in the full opinion of Justice Ginsberg.

Ever since Brown v. the Board of Education, 347 US 483 (1954), equal protection of law has been separated into three basic components. These are "suspect categories," and "fundamental interests" which "trigger" increased scrutiny by the Federal Courts. When the right is of a fundamental nature, a hearing must be held, Bishop v. Wood, 426 US 341 (1977). This Court has long held that parental rights are raised to the level of "fundamental" Constitutional rights, equated with that of a liberty interest.

In fact, the instant matter falls within two of the three categories of cases emerging from Brown, supra, as special "suspect categories" which require greater scrutiny by the Federal Courts. The three categories of cases included are those involving race, gender and family relations, the two latter are operative here and are grounded in a long line of cases such as City of Cleburne v. Cleburne Living Center, 473 US 432 (1985); Zablocki v. Redhail, 434 US 341 (1976). When such fundamental interests are at risk, the Federal Judiciary must invoke its oversight function.

POINT TWO:
STATES ABUSE OF THE CHILD ABUSE PREVENTION AND TREATMENT ACT

The increasing intrusiveness by the State into the family seems to have had its genesis when the Congress enacted into law, the Child Abuse Prevention and Treatment Act of 1973,(hereinafter "the Act) which was an effort to raise public awareness with respect to this issue and which provided federal funding for the state agencies. As with much well-intended legislation, it had its unforeseen and unwanted side effects. Problems were complicated by the vague definitions of child abuse and neglect contained in the state statutes developed In response to the Act, in order to receive the federal funds.These place undue weight on the discretion of agency workers and ultimately State Court judges.

Most state statutes which authorize removal of the child contain ambiguous and conclusory phrase such as "lacking proper parental care" or "the environment is injurious to the child's welfare,"or "substantial risk of harm." and the one challenged here, "immediate risk of harm,," all of which call for the worker to be able to predict the future, Besharov, D. "Doing Something About Child Abuse-The Need to Narrow The Grounds For State Intervention", Harvard Journal Of Law and Public Policy, Vol. 8 No. 3, Summer 1985.

One of the unexpected consequences of the Act, was the overreaction by the public in terms of the number of reported cases, which tripled within the next ten years. Another was to cause the agencies to become entrenched in self-sustaining policies imbedded in the bureaucratic structure, for the purpose of competing for the federal funding. In addition, workers unsure of how to handle the discretion, tended to "err on the side of safety" and remove children from their homes, whom they would not have in the past.

Since child abuse and neglect are crimes, many assume there are clear statutes with respect to same, but the truth is that "Nowhere are there clear cut definitions ..."Giovanni J., Becerra, R., "Defining Child Abuse", 2 (1979). In addition the definitions tend to be very fluid and subject to current trends, cultural

differences, etc, and can be very different from one jurisdiction to another. As a consequence, neither parents nor professionals have any clear concept to guide their judgements. The noted authority C. Henry Kempe said, "child abuse is whatever the courts say it is," Besharov Ibid.

The effect of these imprecise statutes is that, legally, courts and agencies have virtually unrestricted preventive jurisdiction, but it is accomplished by overstating the ability of professionals to "predict" risks, when they cannot do so. This has caused a twofold phenomenon, both an under and overreaction by caseworkers, and a flood of lawsuits which result from both, creating an obvious Catch 22. The workers are fearful of being held responsible if something happens to a child they didn't remove from the home and more recently, fearful of suits like the one at bar if they intervene unnecessarily.

According to the National Center for the Prevention of Child Abuse, (hereinafter "NCPCA") it appears that up to half of the children taken from their homes by the state, were in no immediate danger at home and could have been safely left there, Besharov (Id.) Most experts agree and the statistics reflect, that, as was the case here, foster care is often more harmful, Goldstein, J., Freud, A., Solnitt, A., "Before The Best Interests of The Child", 13 (1990). These policies pervert the very purpose intended by the Act. Public response to the Act, has resulted in an explosion of both the number of cases reported as well as the number of false allegations, which are just as serious as child abuse itself.

These false charges further over burden the system destroy innocent families and divert resources from those who need them most, thus spawning a double tragedy. It is undisputed that fully 65% of the allegations of abuse and neglect are not substantiated. According to the National Center, from 1976 to 1986 the number of cases went from 50,000 to over 1.6 million and the number of cases which were unsubstantiated cases nearly tripled during the same period, Besharov Id.

The rise in false allegations and agency intrusiveness has become a well-known and documented national phenomenon. This problem has been covered extensively in the media and in a plethora of books, "False Accusations of Child Abuse" by Dr. Ralph

Underwager, "A Question of Innocence", by Dr. Lawrence Spiegel, and "Wounded Innocence", by Richard Wexler. There is even a book titled "The Child Abuse Industry" referring to the competition between States for the Federal funds. This led to a groundswell of the formation of family rights groups that resulted in both Federal and State congressional hearings around the country in the 1980's, including New Jersey, see Lodging-A.

The result was almost unanimous, that the various State statutes must be made to conform to the Federal perspectives so that they have a clear and practical mandate to follow which would benefit all. Absent evidence of gross abuse, children should not be taken from their homes and less intrusive measures must be used so as to protect the family, in furtherance of 42 USC Sec. 671 (a)(15). This would take the determination out of the realm of discretion, suspicion and prediction and therefore would eliminate the erroneous violation of due process rights, but has not yet occurred.

Indeed, in this most precious and treasured of liberty rights, if the state and private interest are really the same, then the only times problems would erupt would be if the States are not following the Federal mandate of the Act, and were thus trying to receive funds fraudulently. In all other cases the State should follow the Federal perspective, perhaps best expressed in the words of the Honorable Dalin Oaks of the Utah Supreme Court stating that parental rights;

> "Transcend Constitutional rights and are rooted in nature itself."

Yet the decision and Opinion of the District Court, affirmed by the Third Circuit, to abstain under Younger and dismiss the case at bar, both in its factual interpretations and legal perspectives, are not reflective at all of the professed attitudes of the Federal Judiciary, with respect to this issue, as cited supra. There could be no more important question for this Court than to determine, than whether parents beset by such grave issues are to be afforded the right of access to Federal oversight. It is thus submitted that the issue here is not Federal intrusion into state proceedings, but the reverse.

While states have an important interest in the welfare of their families, they have no right to violate the Federal Act that provides funding for same. This is a matter of the Federal government enforcing the Act, which is an imperative and is actually state

intrusion into compelling federal interests, and abstention should not even be an option.

POINT THREE:
INAPPROPRIATENESS OF ABSTENTION, DENIAL OF DUE PROCESS

In this regard appellant cites the foundational cases in this area, with respect to virtually all types of abstention, wherein each case reminds us that abstention is:

> "an extraordinary and narrow exception to the district court's duty to adjudicate a controversy..." Younger v. Harris, 401 US 37 (1971); Burford v. Sun Oil Co., 319 US 315 (1943); Railroad Comm. of Texas v. Pullman Co., 312 US 496 (1941).

In this regard, however, with respect to the questions raised by the District Court regarding the principles of federalism, comity and abstention, the plaintiff submits that these issues bars are overcome by the perspective developed herein. While the doctrines of federalism, abstention and comity all dictate "a proper respect for State functions...," This is an issue of "a proper respect for Federal functions." In addition, however, Younger abstention is not appropriate if the appellant can show:

1. The State proceedings are undertaken in bad faith or for purposes of harassment.
2. Other extraordinary circumstances exist, such as a proceeding pursuant to a flagrantly unconstitutional statute, such that deference to a State proceeding would present a significant and immediate potential for irreparable harm to the Federal interests asserted, Shall v. Joyce, 885 F2d 101, 106 (3rd Cir.1989)

In this respect, the appellant submits that, that he had a right to choose a Federal forum, Herz. v. Degnan, 648 F. 2d 201, "despite substantial litigation in the state court" for at least a single fact finding hearing, in order to protect these most basic Constitutional guarantees. This would not have prejudiced or disrupted the State

in any way, since the child was already in State custody and would remain so during the pendancy of the Federal hearing. The issues here are virtually identical to those raised in Santosky supra, in that the plaintiff is challenging the New Jersey law, NJSA 9:6-8.21c, which defines child abuse and neglect, as being unconstitutional, in that it is overbroad, unduly vague and which is, in substance, identical to the New York Family Ct.Act 614.1 (a)-(d) challenged in Santosky Id.

It is uncontested that State proceedings seeking to intervene in a parent/child relationship must be accorded the highest level of due process, since the degree of due process is measured by the extent to which one may suffer grievous loss, Goldberg v. Kelly, 397 US 254 (1970). THERE IS NO MORE GRIEVOUS LOSS THAN THAT OF A PARENT LOSING A CHILD. Moreover, the most important criterion for overriding Younger and all abstention doctrines is that due process was not accorded and that there has been far more than a prima facie showing of a ten year campaign of bad faith and harassment of this family by the State agencies, very much akin to events in Dombrowski v. Pfister, 380 US 479 (1965), in that the State has initiated numerous proceedings in an attempt to make the appellant succumb to their abusive exercise of authority.

There is a detailed long-term history of animus, harassment, and bad faith by this agency and by their own admission, they had never once substantiated any abuse. These are exactly the reasons for the 42 USC 1983 statutes, for the aid of Federal jurisdiction, including the prevention of a manifest error of law, or irreparable injury to the parties. Indeed, the Federal Court not only should exercise its discretion in oversight but is actually mandated to do so.

Further, by their actions the State has foreclosed appellant from being able to address the Federal issues in State Court, in addition to all the other exceptional circumstances. In the In the instant case, not only did the State Court apply an improper standard in terms of the legal threshold of proof pursuant to Federal guidelines to prevent the access of a parent to his child, but the family was separated for nearly two years prior, with no evidence of any abuse, before a hearing was even held.

The state proceedings did not give adequate opportunity to vindicate Federal claims, or the proceedings would never have taken

place. The very nature of the proceedings held here were repugnant to the Federal rights seeking to be vindicated. This is precisely the point made in Santosky, when it was observed that the weight and gravity of the private interests at stake were so significant as to cause society's interest in avoiding erroneous decisions so important as to require a higher standard of proof.

The very gravaman of the original Complaint at bar was that the State Court did not afford the opportunity to vindicate the Federal claims, but instead erroneously caused their deprivation, in permitting the State Officials involved to abuse their power and influence within the New Jersey Judicial System, by allowing their "predictions," shifting the burden to the defendant and using the wrong threshold of proof, i.e, "a preponderance," as opposed to "clear and convincing" pursuant to the Santosky decision. The Court in Santosky recognized both the supreme disadvantage which confronts the parent in such proceedings as well as the unique nature of the rights at stake.

> "When the State initiates a parental rights termination proceeding, it seeks not only to infringe upon a fundamental liberty interest, but to end it."

The Court goes on to far more adroitly point out the process which the appellant called "bureaucratic escalation.":

> "The State marshals an array of public resources to prove its case and to disprove the parents. At the fact finding hearing the State cannot presume that a child and his parents are adversaries, UNTIL THE STATE PROVES PARENTAL UNFITNESS... (emphasis added).
>
> The State's ability to assemble a case almost inevitably dwarfs the parents ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given proceeding. The State's attorney usually will be expert on the issues contested and procedures employed and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the

States own professional case workers (and experts) whom the State has empowered both to investigate the family and to testify against it. INDEED, BECAUSE THE CHILD IS ALREADY IN STATE CUSTODY, THE STATE HAS ALSO THE ABILITY TO SHAPE THE HISTORICAL EVENTS THAT FORM THE BASIS FOR TERMINATION." (emphasis added)

In evaluating the threshold of proof the Court stated:

"Given the weight of the private interests at stake the social cost of even an occasional error is sizable... the risk that a factfinder might decide to deprive an individual based solely on a few isolated instances of unusual conduct or idiosyncratic behavior, requires the higher standard to minimize the risk of such error... The [New York] Family Ct. Act violates the due process clause of the Constitution."

When the State of New York claimed that the State procedures must be viewed as a complete package, not on the basis of individual hearings, the Santosky Court responded;

"Indeed, we would have to rewrite all our precedents were we to excuse such a constitutionally defective standard of proof based on an amorphous assessment of the 'cumulative effect' of State procedures."

The very cases cited by the District Court on A-p4, which discuss the reasons for abstention, actually argue against it, with respect to issues of the gravity of the case at bar, New Orleans Public Service, Inc. v. Council of the City of New Orleans et al., 491 US 350 , 369 (1989), the Court, quoting from a case in 1821, Chens v. Virginia, (cite omitted) states:

"We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." Id.

The Court also noted, that there is too often the tendency of the State Court to find that the agency's efforts were diligent, based upon a mandated predicate of good faith which must be accorded them. The Court in Santosky summed up the all too often scenario which results from same.

> "The fundamental liberty interest of natural parents in the care, custody and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections ."

A Federal Court cannot stand idly by, while a State continues to show a flagrant disregard for Federal rights, secured by the Constitution to protect the family, when just one hearing could determine whether the violations have contaminated the State proceedings from the outset and if the child was being held illegally and/or against his will. Under 42 USC Sec. 1983, redress can be sought in a Federal Forum, and abstention was inappropriate and in grievous error.

POINT FOUR:
THE RULINGS MADE HERE CONFLICT WITH PRIOR FEDERAL PRECEDENTS

The instant case is, unfortunately, a graphic example of the devastating results which occur when the Federal Court does not exercise its oversight functions in cases of this nature. The District Court's ruling seems to be virtually incomprehensible, when viewed against the backdrop of the cases and arguments, supra. It would seem that the District Court summarily accepted the State's Opinion of the case, relying primarily on the procedural history recited in same, while ignoring the documentation offered by the appellant.

The documentation provided is mostly in the form of the State's own records, the strongest proof possible which could exist to

clearly support the allegations, that the child was taken without cause. Just the exhibits submitted to the District Court went far beyond a prima facie case. Moreover Most of the cases cited by the District Court in its Orders are so factually distinct as to be irrelevant.

In the New Orleans case, supra, the issue was a rate increase reimbursement for utility expenses. In O'neil v. City of Philadelphia, the issue was over parking tickets. The same is true of Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm., 791 F. 2d 1111, 1116 (3rd Cir. 1986). The only case which even remotely compares with the instant matter is Moore v. Sims, 4490 US 415, 423 (1979), which at least involved family matters, but deals with paternity and is not really on point at all. None of these, nor any of the other cases cited, fall within any of the especially protected groups named supra. How can these cases be compared with the gravity of parental rights? The Santosky Court was careful to note these very distinctions, especially in States where there is no right to Court appointed counsel, as is the case here. In fact the Public Defender's Office in the instant matter is a named defendant, in that they allied themselves with the State.

It would seem, however, that as a result of this perspective, the recitation of the case and the alleged incidents of abuse, in the District Court Opinion are very skewed. While each incident is recited in specific detail, the only fact missing from it is that by the State's own account, there was NEVER ONCE A FINDING OF ABUSE, according the DYFS record! This is, obviously a serious oversight.

The resulting decision to abstain is even more difficult to understand when, the gravaman of the Complaint is precisely the long term bad faith and harassment of this family, by these same State Officials. Furthermore, as is the case here, when the statute that is the foundation of the agency's authority is properly attacked on its face as being unconstitutionally vague and where injunctive relief is sought, the burden should rest more with the State. The Court in Dombrowski v. Pfister, 380 US 479 (1965) stated;

> "The State must, if it is to invoke the statutes after injunctive relief is sought, assume the burden of obtaining a permissible, narrow construction in a non-

criminal proceeding.... on this view of the vagueness doctrine, it is readily apparent that abstention serves no legitimate purpose where a statute is properly attacked on its face."

Perhaps the most perplexing part of the District Court's actions was the determination to issue such a ruling without so much as holding a hearing in which the child could have been interviewed, when it is alleged that he has been programmed and unnecessarily medicated by the State and held against his will. For the Court to seemingly continue to accord these State Officials the presumption of good faith, in light of the history of flagrant acts of bad faith and harassment, shows that the Opinion is clearly in error in that regard and appears to have decided this issue in a manner inconsistent with the case law cited supra.

The Opinion of the District Court that the appellant had not offered any proof of bad faith but only conclusory allegations, merely seems to support the fact that the Court overlooked or misunderstood the DYFS records. The Court seems to have accepted the predictions of the State experts yet ignored the results of their testing, A-p83 which revealed that the plaintiff's personality was clearly within NORMAL LIMITS and fails to support their own experts.

In addition it fails to mention three other psychological and psychiatric reports, A-pp.86-92, each of which contradicted the States contentions and were highly critical of the methods and tactics employed by DYFS. Moreover, the coercive manner in which the medical records were obtained and more importantly the manner in which they were used, are clearly violative of the Americans With Disabilities Act (hereinafter ADA) 42 USC 12131 et seq. These records were faxed to appellant at his job in a non-confidential manner and the appellant was fired a short time later. In addition, the diagnoses therein were used by the State experts in their "predictions" for the future. Their own testimony shows that they "engaged in generalizing and stereotyping" from the illgotten psychiatric diagnoses, to predict future behavior, which has been shown to be inaccurate and improper, and is specifically prohibited under ADA, Ellen v. Florida State Bd of Bar Examiners, (1994 SD Fla.) 859 Supp. 1489, 6 ADD 40, 8, FLW Fed D 321, 3 AD Cas.908; "Using the ADA To Open Gateways", Dept. Of Justice

Newsletter at 5,6 (Wash. D.C. May, 1995); Clark v. Virginia Bd. of Bar Examiners, WL79940 at 6, 7 880 F. Supp 430 (ED Va. 1995).

The issue of the Constitutional questions not having been raised in State Court, is of no significance, since the record clearly shows that the State judge would not entertain it. The same is true of the fact that no appeal was taken, since there is no requirement under 42 USC Sec. 1983 that State remedies need be exhausted. Add to this the fact that, the Opinion states that there is no irreparable or immediate injury shown by the plaintiff. If the loss of one's child is not irreparable injury, what is? These issues again raise questions as to how closely the record was scrutinized and the of sensitivity of the Court to the issues involved. It is clear that the Federal Courts have consistently held;

> "Where fundamental liberties are claimed to have been infringed, the State record must be carefully scrutinized." Blackburn v. Alabama, 361 US 199 (1960); Moore v. Michigan, 355 US 155 (1957).

In Fiske v. Kansas, 274 US 380 (1927), the Court stated:

> "State factual determinations not fairly supported by the record, cannot be conclusive of Federal rights."

Both of these issues must be called into question here, given the disparity between the Opinion and the record. Lastly, in Townsend v. Sain, Ibid, the Court stated:

> "...if any combination of facts would prove a violation of constitutional rights...and the issue of law on those facts presents a novel or difficult or problem for decision...the Federal Court MUST hold a hearing."(emphasis added)

Nothing could be more on point with the case at bar. But there is far more to the issues here, than first meet the eye There are realities of a different dimension which will not only justify, but will mandate Federal action.

POINT FIVE:
42 USC SEC.1983, THE ADA, THE NEED FOR FEDERAL INTERVENTION, ABSTENTION IN LIGHT OF BAD FAITH, MALFEASANCE AND CRIMINALITY

The provisions and three stated purposes to 42 USC Sec. 1983 are each at issue. "One is that it can override certain kinds of state laws. Secondly it provides a federal remedy where state law is inadequate and three that it provides a federal remedy where a state remedy though adequate in theory, is not available in practice," Monroe v. Pape, 365 US 167, 5 L Ed. 2d 492, 81 S Ct. 473 (1961). The last of these three is of special importance in the case at bar.

Moreover, the purpose of this right of redress was to "afford the right of access to Federal Courts, because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and claims of citizens to enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by State Agencies," District of Columbia v. Carter , 409 US 418, 34 L Ed. 2d 613, 93 S Ct. 602 (1973).

Further, through the Civil Rights statutes, Congress specifically intended to enforce the provisions of the Fourteenth Amendment against those who carry a badge of authority of the State and/or represent it in some authority, and to determine whether they act in accordance with their authority or misuse it. Lastly, the statutes above, are established as a cause of action when such deprivations are caused by those acting under color of state law, Parratt v. Taylor, 451 US 527, 68 L Ed. 2d 420, 101 S Ct. 1908 (1981).

In addition, there may well be violations of the Americans with Disabilities Act, 42 USC 12131 et. seq., in the manner in which the father's psychiatric records were used against him, which was both unwarranted and illegal and will be discussed more fully, infra. These are all predicates upon which the petitioner relied, to seek redress in Federal District Court. If the Civil Rights Statutes, the ADA and Constitutional Rights are to be looked upon as sanctified, as they should be, and specifically the provisions under 42 USC Sec. 1983, Baker v. McCollan, 443 US 137, 61 L. Ed. 2d 433, S Ct. 2689 (1979) and when one of the express purposes of same

is to provide the right to access to a Federal Forum, "despite the fact that there may have been considerable State litigation the plaintiff should not be denied the choice of a Federal Forum," Herz, supra, especially when there are fundamental rights at issue. Most importantly, in every case, there is inevitably the proviso that any judgement can only be operable "absent evidence of fraud collusion etc," Last Chance Mining Company v. Tyler Mining Company, 157 US 683, 691. Where fraud or collusion is shown, the judgement must be considered a nullity. This is especially true when there has been "a history of harassment and/or bad faith by officials acting under color of State Law and/or evidence of official lawlessness," as stated in Cf.Georgia v. Rachel, 384 US 780;

> "In such circumstances the reasons of policy for deferring to state court adjudication are outweighed by the injury flowing from the very bringing of the proceedings, by the perversion of the very process that is supposed to provide vindication and by the need for speedy and effective action to protect federal rights."

It is apparent from the long term harassment and procedural history of this case, infra, that there is no remedy available within the State Courts. In Terrace v. Thompson, 263 US 197, 214, the Court stated:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the federal Constitution wherever it is essential in order effectually to protect property rights of persons against injuries otherwise irremediable: and in such a case a person who as an officer of the State is clothed with the duty of enforcing its laws..."

the Court in Santosky stated;

> "While civil disputes over property or financial concerns may be significant...they cannot be compared to the interests involved in termination proceedings...the removal of a child from the parents is as great, if not greater than a criminal penalty...it cannot even be adequately protected by

the appointment of counsel."

This Honorable Court must set some realistic guidelines as to when and whether federalism should reach circumstances as grave as these, when the delay in the state courts is part of the problem. The State Court cannot be allowed to decide when the Federal Court should abstain. This is a federal question and the Court must hold at least one fact finding hearing when there is a reasonable question that a child has been taken from the parent illegally, when as here, the record shows there was never any abuse!

It is further asserted that these defendants are no longer entitled to any presumption of good faith, because of their abuse of power and process, making it impossible for the plaintiffs to pursue or receive a full and fair hearing within the State system. The appellant did not appeal the result of the first fact finding hearing since another hearing in a new venue was to be scheduled. Yet all along, the defendants have continued to delay the proceedings and continue even now as seen in A- so that the time for a state appeal has run and appellant is left with no remedy. Further, in Fay v. Noia, supra, the Court stated:

> "Respondent's failure to appeal cannot, in the circumstances of this case be deemed an intelligent and understanding waiver of his right...such as to justify withholding of federal relief." The Federal Courts clearly have an oversight function.
>
> "When a Federal Court is properly appealed to in a case over which it has jurisdiction, it is its duty to take such jurisdiction..." Preiser et. al. v. Rodriguez et. al., 411 US 475 , 456 F. 2d 79 (1973); Willcox v. Consolidated Gas Company, 212 US 19, 40; England v. Louisiana State Board of Medical Examiners, 375 US 411, 415 (1964)

This is also true if the plaintiff might not be treated fairly by state authorities including the state judiciary, Monroe v. Pape 365 US 167, 180 (1961). In O'Neil v. City of Philadelphia, 32 F. 3d 785 (3rd Cir. 1994) this Court stated

> "...abstention is not appropriate where the federal claimant makes out a showing of bad faith harassment, or some

other extraordinary circumstance."

In Preiser, supra, Justice Brennan stated;

> "We have also recognized that review by this Court of State decisions, even when available by appeal rather than only by discretionary writ of Certiorari, is an inadequate substitute for the initial District Court determination."

In all these cases, the full faith and credit clause could only be enforced if there was a full and fair hearing on the merits. This is true even in Younger supra, which says that the "Federal Courts should not UNDULY interfere with State Court proceedings." It contains the same provision; that the judgement can only be given "full faith and credit" upon a determination that it was a "full and fair hearing," Allen v. McCurray, 449 US 90, (1980); Dist. of Columbia Court of Appeals v. Feldman, 460 US 462, 103 S. Ct. 1303, 75 L.Ed. 2d 206 (1983); Henderson v. Kibbe, 431 US 145 (1977); Nevada v. United, 463 US 110 (1983).

It is submitted that in the instance case that no plenary hearing was held for almost two years, after the child was removed and that when such a hearing did take place it was neither full nor fair and fraught with due process violations.

> "Conventional notions of finality...cannot be permitted to defeat the manifest federal policy that federal constitutional rights...shall not be denied without the fullest opportunity for federal plenary review...By relying on a rule of discretion avowedly flexible and always yielding to exceptional circumstances, this Court has refused to concede jurisdictional significance to abortive State Court proceedings." Fay v. Noia, 372 US 392, 393 (1962).

Further, the denial of due process is especially repugnant here, when a litigant is challenging the very State Law under which he is being prosecuted, (also true in Dombrowski) and contends that the statutes under which the State proceeded were overbroad and the language is so vague as to be unconstitutional. In addition the State Court used the wrong threshold of proof and wrongly shifted the burden to the appellant. In Dombrowski, supra, the Court held;

"The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a non-criminal proceeding....on this view of the vagueness doctrine, it is readily apparent that abstention serves no legitimate purpose where a statute is properly attacked on its face."

Appellant herein is challenging the constitutionality of the state statutes in question and violations of 42 USC Sec.671(A)(8)-(15) which are actionable under 42 USC 1983, for damages and the defendants are not immune, Yvonne L. v. New Mexico Dept. Soc. Serv.(CA10 NM, 959 F.2d 883, 1992).

"The principle of abstention cannot simply be used to give the state courts the first opportunity to vindicate a federal claim is particularly significant when, as here, the statute is being attacked..." Dombrowski, supra

CONCLUSION

It is difficult to find a case that so desperately cries out for Federal intervention and modifying of the abstention doctrines. A father and son have been erroneously deprived of virtually all their fundamental rights, both procedural and substantive due process, in contravention of Federal Law and the Constitution of the United States of America, without a scintilla of evidence which would justify same.

These facts are not even disputed by the State Officials whose arrogance and abuse of influence are unbridled and now extends to the jurisdiction of this Court. If the Court does not exercise such jurisdiction, these state officials will be free to go on flagrantly and defiantly violating its most basic ideals. This Court cannot be a party to such hubris by denying to grant even so much as a hearing, when family rights, Federal issues and Federal funding are at stake.

Finally, the agencies named in the Complaint, have literally committed crimes against this family covered under 18 USC Section 242 and violations of N.J.S.A. 2C:52-34, as well as under the Act. What has gone on here is nothing short of State sponsored

kidnapping, and reaches the threshold of violating other criminal statutes as well, including state and Federal kidnapping and unlawful detention statutes as well NJSA 9:6-8,21 (c) supra, and 42 USC Sec.671 (a)(8)(15).

Moreover the very fact that this is an attempt by State Officials to receive federal funds, especially those provided by the Act, makes the acts of these State Officials criminal in nature and the very definition of Official Misconduct under NJSA 2c:30-2(a)(b) which states;

> "A public servant is guilty of Official Misconduct, when, he acts with purpose to obtain a benefit for himself or another, or to deprive another of such benefit."

The Federal Court cannot use doctrines of abstention to defer to compelling state interests if those interests involve the commission of crimes. The State of New Jersey must be held accountable, they cannot simply take a child away from a natural parent without just cause. Federal Courts must provide the oversight needed to protect against the wrongful destruction of the family, which would require but one day of the Court's time. Surely this is not too much to ask when the welfare of a family is at stake and that is all the petitioner seeks.

The emphasis on the sanctity of the family is not limited to the United States. It is so widely held and so profound that it is expressly stated in Article 12 of the Charter of the United Nations, which states;

> "No one shall be subjected to arbitrary interference with his privacy, family, home...everyone has the right of the protection of law against such interference or attacks."

We cannot allow such travesties to continue to occur in the Nation looked upon as the leader in human rights. If families who are targeted by State Officials and subjected to years of harassment cannot turn to the Federal Courts, where can they turn? Unless this Honorable Court and the Federal Judiciary take a strong stand on this issue, States will be free to continue to violate Constitutional rights and Federal law with impunity and receive federal funds for doing so.

The statistics from the NCPCA indicate that the number of

unsubstantiated allegations and unwarranted agency intrusions into the family are continuing to skyrocket and millions of innocent families are being needlessly destroyed each year. This is a Federal issue and must be treated as same. President Reagan once said that "as goes the family, so goes the Nation." If that is true, this country is in trouble. More and more Family Rights Groups are daily becoming increasingly dehumanized and frustrated by the way they are being treated by the State Agencies and Courts.

These kind of lawsuits are clogging the system and many families are becoming more radical in their approach to the problem. On May 11, 1998 there is a planned March on Washington D.C. by family rights groups from across the county. Some groups are now turning to violence and vigilantism to resolve their problems Child kidnappings are at epidemic proportions and only a small percentage are committed by non-relatives, Spiegel, L, "Expert Witness-Justice on Trial", The Forensic Examiner, Vol.7 Nos3 & 4, March/April 1998.

Only the intervention of the Federal Courts can help stem this tide and perhaps prevent an all out rebellion on the part of millions of parents. The rhetoric of many of the groups is becoming progressively more radical. They quote the words of Fredrick Douglas spoken in 1857 that are still extremely poignant in 1998:

THE LIMITS OF TYRANTS

> "Find out just what people will submit to and you have found out the exact amount of injustice which will be imposed upon them; and these will continue until they are resisted by words or deeds or with both. Power concedes nothing without demand. It never has and never will. The limits of tyrants are prescribed by the endurance of those whom they oppress."

The families and citizenry of this country have had enough. Until the Court settles this issue, more families will remain at risk on a daily basis and with them the very fabric of our society.

WHEREFORE, petitioner prays for an expedited hearing,

for the injunctive relief requested in District Court, so that it may be possible that Eric be returned prior to emancipation in July of this year and even if this is not possible, for an Order directing the District Court to prevent DYFS from concealing Eric's whereabouts after emancipation, which is their stated objective and to reinstate the rest of the case for declaratory judgement and redress of other grievances, as well as to make certain that the other Federal protections are ensured and the sanctity and dignity of the family be accorded the respect and honor it deserves.

Respectfully Submitted,

Michael Bellesfield

Date: 5/6/98

Michael Bellesfield, pro se